Supreme Court, U.S.
FILED
93-1036 DEC 20 1993

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

JOHN W. SELCH,

Petitioner

v.

CHRISTINE W. LETTS, in her official capacity as the Director of the INDIANA DEPARTMENT OF HIGHWAYS; DANIEL A. NOVRESKE, in his official capacity as the Chief Deputy Director of the INDIANA DEPARTMENT OF HIGHWAYS; ROBERT D. BOXELL, in his official capacity as the Chief of the Personnel Services Division of the INDIANA DEPARTMENT OF HIGHWAYS; and FREDERICK GLASS, in his official capacity as the Governor's Executive Assistant for Transportation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Seventh Circuit opinion in this case conflicts with the Fourth Circuit Court of Appeals' opinion in Akers v. Caperton, 998 F.2d 220 (4th Cir. 1993).

2. Whether the decision below raises significant and recurring problems concerning political affiliation as an appropriate requirement for a position which is within a classic bureaucratic model, whose responsibility and discretion are substantially cabined by the goals, policies, procedures, and guidelines of superiors within the bureaucracy.

3. Whether discharge on the basis of partisan politics from public employment which does not include room for the legitimate exercise and discretion based upon partisan politics, in which the only threat to in-party objectives would result from insubordination or poor job performance or some other conduct which would constitute cause for discharge, contravenes First Amendment rights to freedom of speech and association as guaranteed through the Fourteenth Amendment to the United States Constitution.

PARTIES TO THE JUDGMENT BELOW

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The Petitioner, John W. Selch, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 21, 1993.

OPINION BELOW

The opinion of the Court of Appeals is reported as Selch v. Letts, 5 F.3d 1040 (7th Cir. 1993).

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on September 21, 1993. No petition for rehearing was filed. This petition for certiorari is filed within ninety (90) days of the date of judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The jurisdiction of the District Court was based on 28 U.S.C. §§ 1331 and 1343. Selch alleged violation of rights secured to him by the first and Fourteenth Amendments to the United States Constitution and claimed a right to relief under 42 U.S.C. § 1983. The jurisdiction of the Seventh Circuit was pursuant to 28 U.S.C. § 1291, on an appeal from a final judgment that disposed of all issues as to all parties.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. Amend. XIV, § 1

All persons born or naturalized in the United States,and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

John W. Selch filed a civil rights action (42 U.S.C. § 1983) against Defendants claiming that he was discharged on the basis of partisan politics in violation of his First Amendment rights to freedom of speech and association as guaranteed through the Fourteenth Amendment.

Mr. Selch held the position of Subdistrict Superintendent for the Indiana Department of Highways.[1] Selch contended that his termination was politically motivated and that the position of Subdistrict Superintendent did not come within any of the exceptions to the so-called Elrod/Branti doctrine prohibiting politically motivated discharges of public employees.

A Subdistrict Superintendent is responsible for the maintenance of the roads within his subdistrict. In Indiana there are thirty-seven subdistricts which blanket the entire state. The Superintendent has no role or responsibility regarding new construction. The Superintendent's goals, maintenance program, objectives, and policies are formulated by the department central office and handed down through the departments "Departmental Policies Manual," "Field Operations Manual", and the "Maintenance Management System". (Exhibits Nos. 52, 49). The purpose of the Maintenance Management System is to assure effective, efficient, safe highway maintenance operations, with uniformity throughout the state. (Exhibit No. 49).

The position is on the lower end of the hierarchy in a classic bureaucratic model. There are five levels of management above the position and only one level between the Subdistrict Superintendent and manual laborers. The responsibility and discretion inherent in that position is closely cabined by the goals, policies, and procedures established by superiors in the bureaucratic hierarchy. There is no room for the legitimate injection of partisan politics into job performance.

---

[1] Through Legislation effective in 1989, other state transportation functions were merged with the old Indiana Department of Highways. The emerging entity was renamed the Indiana Department of Transportation. Hereinafter, for ease of reference, the governmental unit dealing with highways is simply referred to as the "Department". Further, as a part of this restructuring, the Subdistrict Superintendent position was renamed "Subdistrict Manager". The District Court found that this retitling of position was not relevant to consideration of the case. The Seventh Circuit Court of Appeals likewise found "that the change in title [of the Department] is of no significance . . . ." Selch v. Letts, 5 F.3rd 1040-1041, fn. 1; 1042, fn. 2.

The District Court found that Mr. Selch's job did not entail meaningful input into government decision-making or legitimate disagreement over the "goals" of Subdistrict Superintendent. The Court of Appeals did not disturb this finding. Selch v. Letts, 5 F.3d at 1043.

Instead, both the District Court and Court of Appeals embraced a broad view of the role of politics in the implementation of policy. Id., 1045. The courts below focused upon whether an opposition party member could "reasonably" serve to thwart the policy goals of the party in power while serving in a particular position. These courts appear to have concluded that discharge on the basis of partisan politics is justified if the image of the incumbent party could be adversely affected merely by the failure to properly perform job duties which are not affected by political considerations.

This approach conflicts with both the analyses and outcome presented in the remarkably similar case of Akers v. Caperton, 998 F.2d 220 (4th Cir. 1993), which dealt with the position of maintenance superintendent with the West Virginia Department of Highways. The Seventh Circuit Court of Appeals noted this conflict in its opinion. Selch v. Letts, 5 F.3d at 1045.

ARGUMENT

The recognition that handing out "political spoils" following a party-line change in administration conflicts with First Amendment Rights of freedom of speech and expression, has not led to any easily applied rules to determine what constitutes impermissible political patronage, Elrod v. Burns, 427 U.S. 347 (1976), as opposed to a legitimate effort to simply install political allies of the "in-party" in government's most sensitive jobs. See, e.g., Wilbur v. Mahon, 3 F.3d 214 (7th Cir. 1993). In this case, both the District Court and Court of Appeals held that it was proper to replace John Selch, a highway subdistrict superintendent because of his political affiliation even though:

> At least in terms of Mr. Selch's communications with his superiors, it would be a stretch to say that his job entailed "meaningful input into government decision making." Except for the information he supplied in conjunction with the budgeting process, there was little evidence that he was relied upon to provide critical information or other "input" to the hierarchy of the highway department. Moreover, if the term "goals" is broadly construed, there was little room for disagreement over Mr. Selch's goals. Broadly put, Mr. Selch's goal was simply to insure that the road construction and maintenance work in his subdistrict was effectively and speedily undertaken. (Citations omitted).

Selch v. Letts, 5 F.3d at 1043. Nevertheless, both courts condoned Selch's discharge on the basis of his political affiliation.

The opinions of both the District and Appellate Courts are flawed because they focus almost exclusively on the fact that Selch was a "critical and highly visible representative of the state administration . . .", Id. at 1047, even though the only threats to the administration's objectives Selch could pose would result from insubordination or poor job performance, or some other conduct which would allow discharge for cause.

Police officers, bus drivers, and even state office telephone operators or tour guides are all critical and highly visible employees. "However, no one would seriously argue that these positions are outside Elrod and Branti's protection." Akers v. Caperton, 998 F.2d 220, 225 (4th Cir. 1994).

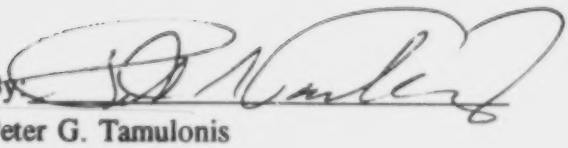
In examining Selch's significant job responsibility, (e.g., 60 subordinate employees and a $1,000,000 budget), the Seventh Circuit Court of Appeals strays away from the determinative factor of whether "there is a rational connection between shared ideology and job performance." Savage v. Gorski, 850 F.2d 64, 68 (2d Cir. 1988) (emphasis added).

The Court of Appeals for the Fourth Circuit made no such mistake when it stated: "[L]ittle persuasive force attends a contention that [deciding which pothole should be filled first] requires a certain political affiliation in order to be effectively performed." Akers v. Caperton, 998 F.2d at 225 (paraphrasing: Abraham v. Pekarski, 537 F.Supp. 858, 865 (E.D. Pa. 1982) aff'd in part and rev'd in part, 728 F.2d 167 (3d Cir.) cert. denied, 467 U.S. 1242. The Seventh Circuit has acknowledged the factual similarity with Akers and the conflict with the Fourth Circuit in legal analysis. Selch v. Letts, 5 F.3d at 1045. This conflict between the circuits should be resolved.

An end to the mounting "shambles" of "inconsistent and unpredictable results" in political affiliation cases referred to by Justice Scalia and noted by the Seventh Circuit in this case, Selch, 5 F.2d at 1047, quoting Rutan v. Republican Party of Illinois, 497 U.S. 62, 111-12 (1990), will only come when this Court again affirms the principles of Elrod v. Burns and limits political firings only to positions where a rational relationship between party affiliation and job performance is manifest.

CONCLUSION

Petitioner John Selch respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit.

By: 

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In the

United States Court of Appeals

For the Seventh Circuit

No. 92-2558

JOHN W. SELCH,

Plaintiff-Appellant,

v.

CHRISTINE W. LETTS, in her official capacity as the Director of the INDIANA DEPARTMENT OF HIGHWAYS; DANIEL A. NOVRESKE, in his official capacity as the Chief Deputy Director of the INDIANA DEPARTMENT OF HIGHWAYS; ROBERT D. BOXELL, in his official capacity as the Chief of the Personnel Services Division of the INDIANA DEPARTMENT OF HIGHWAYS; and FREDERICK GLASS, in his official capacity as the Governor's Executive Assistant for Transportation,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. IP89-778—**John D. Tinder**, *Judge*.

ARGUED JANUARY 7, 1993—DECIDED SEPTEMBER 21, 1993

Before CUMMINGS and KANNE, *Circuit Judges*, and EVANS, *Chief District Judge.**

KANNE, *Circuit Judge*. For some, the mention of the phrase "political patronage" may conjure up distasteful and unpleasant thoughts of party faithful being rewarded for an election victory with the "spoils" of government jobs. Nevertheless, the fact is the effective implementation of public policy sanctioned by the voters (and some say the survival of a viable two-party political system) depends on a newly elected administration placing politically loyal individuals in certain government positions. Of course, following the ouster of the "in party," the initial aspect of the implementation of political patronage typically results in the "creation of vacancies" in the government work force. In 1988, Indiana voters rejected the incumbent Republican administration and elected a Democratic governor. Thus, we are required in this appeal to decide whether John Selch's discharge from his position as an Indiana highway subdistrict superintendent, shortly after the new Democratic administration came into power, was a constitutionally proper exercise in the practice of political patronage.

I.

Until 1989, through both Democratic and Republican administrations, the Indiana Department of Highways[1] operated under a patronage system which required signed political "clearance cards" for all Department employee hirings. Selch concedes that during a Republican adminis-

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* The Honorable Terence T. Evans, Chief Judge of the Eastern District of Wisconsin, is sitting by designation.

[1] Through legislation effective in 1989, other state transportation functions were merged with the old Indiana Department of Highways. The emerging entity was renamed the Indiana Department of Transportation. Hereafter, for ease of reference, we refer to the Indiana governmental unit dealing with highways simply as the "Department."

tration in 1984 his status as a Republican loyalist enabled him to secure the position of Highway Engineering Assistant III with the Department. Later that year, he was promoted to Highway Maintenance Supervisor V, which increased his responsibilities from the performance of quality inspections to the supervision of a road crew of ten to twelve workers. Finally, in 1986, the Highway Commissioner elevated Selch to the position of Superintendent of the Greencastle Subdistrict, one of 37 such geographic highway zones in Indiana.

By the fall of 1988, there began to emerge a real possibility that a Democrat would occupy the Indiana governor's mansion for the first time in twenty years. Fearful that a new administration would not appreciate his loyalty to the Republican party, Selch requested a demotion to what he believed was the "politically safe" position of unit foreman; his request was denied.

In November of 1988, possibility became reality—Democrat Evan Bayh was elected governor. Governor Bayh had campaigned on the need to increase the efficiency of government in general, including that of Indiana's highway maintenance, construction and repair operations. The Indiana State Employees' Association's endorsement of Bayh was based, in part, on his pledge to eliminate waste and mismanagement within the state highway operations.

In carrying out a legislatively enacted reorganization, Governor Bayh appointed Christine Letts to serve as the Director of the new Department of Transportation. In late January of 1989, with the Democratic administration in place, Selch sent a letter to Letts requesting that he be retained as the Greencastle subdistrict superintendent. However, membership in the Democratic Party had replaced membership in the Republican Party as an indispensable qualification for the position of subdistrict superintendent.[2]

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[2] As part of the restructuring, the "subdistrict superintendent" position was renamed "subdistrict manager." Because this change in title is of no significance in this appeal, we will simply refer to the position at issue as subdistrict superintendent.

In late June 1989, receiving the same treatment as his 36 fellow Republican subdistrict superintendents, Selch was discharged from his position and replaced with a Democrat.

Less than a month later, Selch filed suit in state court. The case was then removed to the United States District Court for the Southern District of Indiana. His claim came under 42 U.S.C. § 1983. Seeking to recover his former position of subdistrict superintendent, Selch alleged that he was discharged on the basis of his political affiliation, in violation of his First Amendment rights to freedom of speech and association as guaranteed through the Fourteenth Amendment.

II.

To succeed in his claim of improper dismissal or demotion based on constitutionally protected behavior, Selch had to prove that his status as a Republican was a motivating factor in the decision to discharge him from the position of subdistrict superintendent. *Nekolny v. Painter*, 653 F.2d 1164, 1167 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021, 102 S. Ct. 1719 (1982). Upon that showing, the burden shifted to the defendants to demonstrate that "party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti v. Finkel*, 445 U.S. 507, 518, 100 S.Ct. 1287, 1295 (1980).

Following a bench trial, the district court entered judgment in the defendants' favor, finding that although politics was a motivating factor in Selch's dismissal, political affiliation was a proper requirement for the position of subdistrict superintendent. On appeal, the defendants do not challenge the district court's finding that the dismissal was politically motivated. However, Selch contends that the district court erred in holding that the position of subdistrict superintendent was one for which political affiliation was a constitutionally valid requirement.

III.

The issue of whether political beliefs are a proper consideration for a particular government position originated in the 1970's case of *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673 (1976). In *Elrod*, the Supreme Court held that the decision of the sheriff of Cook County, Illinois, to discharge certain employees based on whether or not they worked on his campaign violated their First Amendment rights of freedom of speech and association. Yet the Court also held that an exception to the constitutional prohibition on patronage employment practices exists when those rights are outweighed by the government's need for political loyalty in employees, as is the case in both policymaking, *id.* at 367, 96 S. Ct. at 2687 (plurality opinion), and confidential positions. *Id.* at 374-75, 96 S. Ct. at 2690 (Stewart, J., concurring).

In *Branti*, the Supreme Court abandoned the exclusive use of these terms to describe the types of positions exempt from patronage restrictions:

> Under some circumstances, a position may be appropriately considered political even though it is neither confidential nor policymaking in character. . . . It is equally clear that party affiliation is not necessarily relevant to every policymaking or confidential position. . . . In sum, the ultimate inquiry is not whether the label "policymaking" or "confidential" fits a particular position; rather the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

445 U.S. at 518, 100 S. Ct. at 1294-95. We have phrased the relevant inquiry as "whether the position held by the individual authorizes, either directly or indirectly, meaningful input into government decisionmaking on issues where there is room for principled disagreement on the goals or their implementation." *Nekolny*, 653 F.2d at 1170.

The district court found *Nekolny's* reformulation of Supreme Court precedent of little assistance.

> At least in terms of Mr. Selch's communications with his superiors, it would be a stretch to say that his job entailed "meaningful input into government decision making." Except for the information he supplied in conjunction with the budgeting process, there was little evidence that he was relied upon to provide critical information or other "input" to the hierarchy of the highway department. Moreover, if the term "goals" is broadly construed, there was little room for disagreement over Mr. Selch's goals. Broadly put, Mr. Selch's goal was simply to insure that the road construction and maintenance work in his subdistrict was effectively and speedily undertaken. (Citations omitted).

Nonetheless, the district court held that, in light of the significant amount of responsibility involved and the ability to "threaten the goals of the in-party," political affiliation was an appropriate requirement for the subdistrict superintendent position.

Selch argues on appeal that by focusing on those two factors, the district court's opinion conflicts with Supreme Court and Seventh Circuit precedent. Reviewing this question of law *de novo*, we find no error.

IV.

In addressing the ultimate inquiry of whether political affiliation is an appropriate requirement for Selch's position, the district court appropriately took into account the amount of responsibility the subdistrict superintendent position entailed. The Supreme Court has recognized that political patronage addresses "the need for political loyalty of employees, not to the end that effectiveness and efficiency be insured, but to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies

presumably sanctioned by the electorate." *Elrod*, 427 U.S. at 367, 96 S. Ct. at 2687 (plurality opinion). As an employee's level of responsibility increases, so does his ability to obstruct the implementation of policy. Persons who occupy positions subject to constitutional protection "usually have only limited responsibility and are therefore not in a position to thwart the goals of the in-party." *Id.*

In *Elrod*, the Supreme Court found the nature of the responsibilities critical because "[e]mployee supervisors, for example, may have many responsibilities, but those responsibilities may have only limited and well-defined objectives." 427 U.S. at 368-69, 96 S. Ct. at 2687. "An employee with responsibilities that are not well defined or are of broad scope more likely functions in a policymaking position." *Id.* at 368, 96 S. Ct. at 2687. The greater the degree of discretion inherent in an employee's position the more difficult it becomes for the state to discharge the employee for insubordination, despite the fact that the employee's performance frustrates the implementation of the administration's policies.

Contrary to Selch's assertions on appeal, the district court not only inquired as to the degree of responsibility held by a subdistrict superintendent, but also examined the nature of that responsibility. The court found the wide discretion exercised by the subdistrict superintendent persuasive in concluding the position was exempt from First Amendment protection. Having found that the subdistrict superintendent possessed a substantial degree of responsibility that involved the exercise of discretion, the district court did not end its analysis. For while a great deal of responsibility and the ability to exercise discretion go a long way to show that the position is exempt from First Amendment protection, not all such positions require a loyal political affiliation. For example, few would dispute that the head football coach of a state university possesses substantial responsibility involving wide discretion, but "no one could seriously claim that Republicans make better coaches than Democrats, or vice versa, no matter which

party is in control of the state government." *Branti*, 445 U.S. at 518, 100 S. Ct. at 1295.

Thus, the district court properly proceeded to examine whether an opposition party loyalist in the position in question could reasonably serve to threaten the policy goals of the party in power. This approach demonstrated a clear and insightful understanding of the law as it advanced the policy recognized by the exception to the constitutional restriction on patronage hiring—"elected officials cannot implement the policies that they were elected to carry out, and hence the will of the electorate cannot be effectuated, unless the officials can install their political allies in the most sensitive jobs." *Wilbur v. Mahan*, No. 92-3379, slip op. at 5 (7th Cir. August 23, 1993).

V.

Concluding that the district court did not err as a matter of law, we turn to the issue of whether it correctly found that Selch's political affiliation could constitutionally be considered for the position of subdistrict superintendent. We review the court's finding under the clearly erroneous standard of Fed. R. Civ. P 52(a) and will reverse only when "left with the definite and firm conviction that a mistake has been committed." *Tomczak v. City of Chicago*, 765 F.2d 633, 639 (7th Cir.) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 541 (1948)), *cert. denied*, 474 U.S. 946, 106 S. Ct. 313 (1985). In making this inquiry, we examine the position's inherent powers, rather than those actually exercised by any one occupant. *Heck v. City of Freeport*, 985 F.2d 305, 309 (7th Cir. 1993); *Tomczak*, 765 F.2d at 640-41.

Indiana is geographically divided into six regional highway districts, which are each in turn divided into several subdistricts. Subdistrict superintendents are located throughout the state and are the members of the Department's management organization primarily responsible for highway operations within defined geographic areas. Selch's responsibilities as subdistrict superintendent included the

direction and coordination of all the maintenance activities relating to the over 800 miles of state highways within his subdistrict. For the Greencastle subdistrict, this required the management of over 60 employees and a $1,000,000 budget.

The management hierarchy of the Department descended from the state level at Indianapolis, to the regional district level, and finally to the local subdistrict. According to the official job description of subdistrict superintendent, Selch "overs[aw] the maintenance and repair program for state highways, buildings and grounds, and equipment in [the subdistrict]."

In particular, as the subdistrict superintendent, Selch was charged with:

> —plan[ning the] annual workload and determin[ing] resource requirements based upon that plan;
>
> —investigat[ing] and tak[ing] corrective action on complaints and information requests from the general public; [and]
>
> —provid[ing] personal supervision, personnel, and equipment during emergencies, such as snow and ice removal, detours, accidents, and road repairs, etc.

To perform these responsibilities, a subdistrict superintendent must possess the:

> —ability to plan, formulate, and carry-out programs, policies, and administrative matters;
>
> —ability to develop program plans, guidelines, and polices to meet the needs of the sub-district operation; [and]
>
> —ability to effectively communicate with district and subdistrict personnel, contractors, other governmental officials, and the general public.

Based on this description and other evidence presented at trial, the district court found that Selch possessed "almost unbridled authority to determine where and when, within his subdistrict work was to be done."

Selch contends the district court erred because the subdistrict superintendent's goal of maintaining the highways in his area of the state is not subject to principled disagreement based on partisan politics. According to Selch, partisan political considerations do not legitimately affect the order or manner in which potholes are filled. His view finds support in *Akers v. Caperton*, No. 92-2157 (4th Cir. June 29, 1993), in which the Fourth Circuit held that a position similar to that formerly held by Selch was subject to First Amendment protection. *See also Abraham v. Pekarski*, 537 F. Supp. 858 (E.D. Pa. 1982), *aff'd in part*, 728 F.2d 167 (3rd Cir.), *cert. denied*, 467 U.S. 1242, 104 S. Ct. 3513 (1984).

We have previously rejected this narrow view of the role of politics in the implementation of policy. In *Tomczak*, the district court had held that political affiliation was not a proper consideration for the position of the First Deputy Commissioner in the City of Chicago's Water Department because the position only involved "mundane decisions concerning the repair and rehabilitation of the water systems and [did not entail] decisionmaking authority in areas in which there could be principled disagreements about goals or their implementation." 765 F.2d at 641. Recognizing political reality and thus the important role the implementation of policy plays in determining the success of an administration, we reversed the district court's decision:

> [The district court's reasoning] is an unduly myopic view of the role of politics in the seemingly apolitical context of universal provision of services. . . . Elections often turn on the success or failure of the incumbent to provide these services, and, as campaigns develop, the opposing sides put forth varying proposals about how best to provide services. While the ultimate goal of all sides might be the same, there is clearly room for principled disagreement in the development and implementation of plans to achieve that goal.

Id.

Even though the position involved the implementation of policy, Selch argues that political affiliation is not an appropriate requirement for subdistrict superintendent because his discretion was cabined by general directives which came from upper level management.

General policies and guidelines were provided to the subdistrict superintendents through the Departmental Policies Manual and the Field Operations Manual. The Operations Manual set forth various work activities to be performed on the different elements of the state highway system that were located in each subdistrict. For example, the maintenance of bridges would include activities such as bridge repair, patching bridge decks, and hand cleaning bridges. A performance standard existed for each of these activities, which would describe how the work was to be performed and the amount of manpower and materials needed to complete the job.

The maintenance budget for each subdistrict set aside funds for each of the various maintenance activities to be performed throughout the year. The budget was based on historical data as well as input from the subdistrict superintendents on the needs for the upcoming year.

The work was reported to the Department's central office through a "crew day card" system. The unit foremen, who reported to the subdistrict superintendent, received crew cards specifying the work to be completed during an eight hour period. Each card contained information regarding the number of men and materials need to completed the task. The unit foremen assigned a crew of workers and equipment to each activity, and after the task was completed the cards were returned to the central office so that it could record the amount of resources expended. Some of these cards were issued directly from the central office, while others were left to the discretion of the district superintendent or the subdistrict superintendent.

The subdistrict superintendents received a monthly work calendar. For each month the Field Operations Manual

described which activities and how many crew days of work should be scheduled. The subdistrict superintendent, with the assistance of his subordinates, then put together a semi-monthly work schedule, which was reviewed by the District Maintenance Engineer.

At trial, the parties presented conflicting testimony regarding the amount of discretion the subdistrict superintendent exercised under operational directives set forth as a part of the Department's Maintenance Management System. According to Selch, these policies and means of internal control restricted discretion at his management level to the point that he merely performed routine work at the direction of upper management.

On the other hand, Selch's replacement, William Sibbit, testified that the subdistrict superintendent position involved more than the mundane application of the maintenance guidelines. He referred to the Operations Manual only once every three or four months. Other testimony indicated that subdistrict superintendents decided where the road maintenance would be completed within the subdistrict.

In attempting to ascertain the powers inherent in the subdistrict superintendent position, the district court was entitled to credit the testimony of Sibbit and others over that of Selch. "[I]f an officeholder performs fewer or less important functions than usually attend to his position, he may still be exempt from the prohibition against political termination if his position inherently encompasses tasks that render his political affiliation an appropriate requirement for effective performance." *Tomczak*, 765 F.2d at 641.

Policymaking and policy implementation may occur at many levels, even within a particular office whose sphere of authority is narrowly circumscribed. *Nekolny*, 653 F.2d at 1169-70. While input into a policy decision may be limited, "in implementing [a] basic policy, [an employee] will 'make some decisions that will actually create policy.' " *Upton v. Thompson*, 930 F.2d 1209, 1215 (7th Cir. 1991)

(quoting *Livas v. Petka*, 711 F.2d 798, 801 (7th Cir. 1983), *cert. denied*, ____ U.S. ____, 112 S. Ct. 1262 (1992)).

Here, although upper levels of management provided the subdistrict superintendent with guidelines for the execution of maintenance work, the effective implementation of road maintenance policy in diverse geographic areas entailed more than ensuring that maintenance procedures were completed. The subdistrict superintendent could decide where and when the work was to be completed. The way in which subdistrict superintendents located across the state of Indiana exercised this discretion could impact greatly the effectiveness of Department services.

There is significant evidence in political life that the failure to properly provide public services, such as snow removal from highways, will adversely impact on the chief executive of a state or local government charged with providing such services. *See Tomczak*, 765 F.2d at 641 ("Indeed, one of the biggest, if not the biggest, turning points in the 1979 Chicago mayoral election involved the provision of snow-removal services."). In the case before us, the successful implementation of policy in the area of highway maintenance would likely have substantial effect on the public's perception of the Democratic administration, especially given that the Department's performance was an issue in Governor Bayh's campaign.

The subdistrict superintendent's potential impact on the actual or perceived implementation of policy is most readily apparent in the area of investigating and taking corrective action on complaints and information requests. This includes the responsibility entailed in reacting to unforeseen emergency conditions that hinder travel. Subdistrict superintendents typically received fifteen to twenty phone calls per day from public officials and citizens, responding to which requires the exercise of decision-making authority and political sensitivity.

Consequently, even though the subdistrict superintendent falls at the lower end of the management hierarchy, Selch was a critical and highly visible representative of

the state administration and was required to exercise discretion in meeting the needs of public officials and a large number of the electorate. While there is no indication that Selch would not effectively perform his duties, "[a]ctual disruption or disturbance need not be proved." *Wilbur, supra*, slip op. at 7. "Once the employee is classified [as exempt from First Amendment protection], he can be fired on political grounds even if there is no evidence that he would not serve his political superiors loyally and competently." *Id.*

Indiana's new Democratic state administration was not required to recruit informants or engage in secret surveillance of the 37 subdistrict superintendents scattered throughout the entire state to ensure that they exercised their discretion to effectively implement policy, but rather the administration was entitled to fill those positions with individuals politically loyal to it. Consequently, the district court did not commit clear error in concluding that, based on his political affiliation, Selch could be discharged from his position of subdistrict superintendent without violating the Constitution.[3]

VI.

When in *Elrod* the Supreme Court distilled from the First Amendment a directive that political affiliation could only be used as the basis in employment decisions when the government's interest outweighed that of the individual, it left to the discretion of federal judges the traditionally legislative question of which jobs may be subject to patronage employment practices. Not surprisingly, the

[3] We note that our conclusion is supported by the Indiana General Assembly's classification of the position as exempt from its statutory prohibition of employment actions based on political affiliation. Ind. Code § 8-23-2-3(c) (West Supp. 1992). While not dispositive, the statutory classification, "as the considered description of the state legislature, . . . is entitled to great weight." *Lohorn v. Michal*, 913 F.2d 327, 334 (7th Cir. 1990).

inherently fact-specific standard has led to varied, if not conflicting, results. In *Branti*, Justice Powell recognized that "[t]he standard articulated by the Court is framed in vague and sweeping language certain to create vast uncertainty." 445 U.S. at 524, 100 S. Ct. at 1297 (Powell, J., dissenting). This prediction has come true, as evidenced by Justice Scalia's observation ten years later that *Branti* has produced a "shambles" of "inconsistent and unpredictable results." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 111-12, 110 S. Ct. 2729, 2756-57 (Scalia, J., dissenting). *See also Stott v. Haworth*, 916 F.2d 134, 144-45 (4th Cir. 1990) (citing conflicting applications of the *Elrod-Branti* standard).

Given the state of the law regarding the issue of political patronage practices, the district court declared that it approached "the opportunity to apply the *Elrod-Branti* standard to a new set of facts with all the relish of a sojourner forced down a darkened alley on a moonless night." In our view, it completed the journey unscathed. The district court decision demonstrates a well-developed analysis of the law, and the record supports its finding that political affiliation may constitutionally serve as a requirement for the position of subdistrict superintendent. Accordingly, the district court's entry of judgment in favor of the defendants is AFFIRMED.

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COPR. (C) WEST 1993 NO CLAIM TO ORIG. U.S. GOVT. WORKS
792 F.Supp. 1502
(Cite as: 792 F.Supp. 1502)

John W. SELCH, Plaintiff,

v.

Christine W. LETTS, in her official capacity as the director of the Indiana Department of Highways; Daniel A. Novreske, in his official capacity as the chief deputy director of the Indiana Department of Highways; Robert D. Boxell,in his official capacity as the chief of the Personnel Services Division of the Indiana Department of Highways; and Frederick Glass, in his official capacity as the Governor's Executive Assistant for Transportation, Defendants.

No. IP 89-778-C.

United States District Court,
S.D. Indiana,
Indianapolis Division.
June 3, 1992.

Former subdistrict superintendent for Indiana Department of Transportation brought action alleging that his firing was motivated by political affiliation and violated First Amendment. The District Court, Tinder, J., held that although superintendent was fired for politically motivated reason, political affiliation was appropriate job qualification for position of subdistrict superintendent.

Judgment for defendants.

[1] CONSTITUTIONAL LAW k91
92k91

Although politics was motivating factor in discharge of state highway department subdistrict superintendent, no violation of First Amendment occurred since political affiliation was appropriate job qualification for subdistrict superintendent position; job required exercise of significant degree of responsibility, and was position from which employee could seriously threaten goals of in-party. U.S.C.A. Const.Amend. 1.

[1] HIGHWAYS k93
200k93
Although politics was motivating factor in discharge of state highway department subdistrict superintendent, no violation of First Amendment occurred since political affiliation was appropriate job qualification for subdistrict superintendent position; job required exercise of significant degree of responsibility, and was position from which employee could seriously threaten goals of in-party. U.S.C.A. Const.Amend. 1.

[2] CIVIL RIGHTS k240(2)
78k240(2)
Former state employee who alleged that his firing on basis of political affiliation violated First Amendment had burden of proving only that politics was substantial factor behind his firing, not that it was the only factor. U.S.C.A. Const.Amend. 1.

[3] CONSTITUTIONAL LAW k91
92k91
Only constitutionally acceptable basis for patronage employment decision is the end that representative government not be undercut. U.S.C.A. Const.Amend. 1.

[4] CONSTITUTIONAL LAW k91
92k91
Job responsibilities that are ill-defined or broad in scope are indicative of policy-making position for purposes of determining constitutionality of employment decision made on basis of political patronage. U.S.C.A. Const.Amend. 1.

***1503** John B. Drummy, Briane M. House, Kightlinger & Gray, Indianapolis, Ind., for plaintiff.

David C. Campbell, Bingham Summers Welsh & Spilman, Indianapolis, Ind., for defendant.

MEMORANDUM ENTRY FOLLOWING BENCH TRIAL

TINDER, District Judge.

John W. Selch wants his job back. In this lawsuit Selch is seeking to recover his former job with the Indiana Department of Transportation (INDOT) by contending that in 1989 he was illegally fired by the administration of the newly elected Democrat Governor Evan Bayh. Mr. Selch alleges that he was discharged from his position as a subdistrict superintendent with INDOT because of his political affiliation with the

outgoing Republican party and that this action penalized him merely for being a Republican in violation of his constitutional rights to freedom of speech and association.

After a bench trial in which this Court heard the evidence presented by both parties and after reviewing the law governing this case, this Court now issues findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a). [FN1]

FN1. Should any of this Court's findings of fact be more appropriately called conclusions of law, or vice versa then they should be considered by the reader to support the result reached in this entry regardless of how such findings or conclusions are labeled.

FINDINGS OF FACT

This case results from a changing of the guard in Indiana partisan politics. For two uninterrupted decades from 1969 through 1988 Republicans held the Indiana governor's office. In November of 1988 Evan Bayh, a Democrat, broke that twenty year string of Republican gubernatorial victories, promising in his campaign speeches and commercials to end "politics as usual."

John W. Selch was first employed by the Indiana Department of Highways (IDOH) [FN2] in 1984 as a Highway Engineer Assistant III (HEA III). He was at that time, and remains, affiliated with the Republican political party. Selch concedes his job was acquired through political patronage. In fact, Selch's 1984 application for the HEA III job listed as personal references several prominent members of the Republican party from Selch's home county.

FN2. When Selch was originally hired into the department, it was referred to as the Indiana Department of Highways (IDOH). Subsequently, under the Bayh Administration, the title of the department was changed to the Indiana Department of Transportation (INDOT). At all times relevant to this case, the essential functions of the department remained the same--the construction and maintenance of highways (including Interstate highways) and secondary roads throughout the State of Indiana.

Mr. Selch's employment record prior to joining IDOH is not a testimonial to the value of patronage hiring. From 1950 until August of 1979, Selch was employed by the Chrysler Corporation, eventually being promoted to the supervisory position of Production Control Manager. Selch left Chrysler Corporation after it was discovered that he had

committed mail fraud, having personally accepted money from vendors as a bribe to spend Chrysler's money on the vendors' products. Mr. Selch was convicted of mail fraud in federal court in this district in 1982.

After leaving Chrysler in 1979 Selch was employed by the Indiana Bureau of Motor Vehicles ("BMV"). However, in October of 1982 he had to leave the BMV in order to serve his sentence for the federal crime. Nevertheless, except for his criminal *1504 record [FN3], there was no evidence presented at trial that indicated that prior to the 1988 election any of Mr. Selch's employer's (Chrysler, BMV, IDOH) was ever dissatisfied with his performance.

FN3. Evidence of Mr. Selch's conviction was admitted for consideration solely upon the issue of his credibility.

The HEA III position acquired by Selch in 1984 required him to perform quality inspections on new road construction within Indiana. While working at this job, Selch received satisfactory reviews from his supervisors.

At the end of 1984 Selch was promoted to the position of Highway Maintenance Supervisor V, also known as the unit foreman position. As a unit foreman, Selch was responsible for supervising a road crew of ten to twelve workers. This road crew was responsible for performing maintenance and repair work on Indiana highways and secondary roads within a small geographic area of the state. In preparation for this job, Selch received training in management and supervision skills from Purdue University, Selch also received on-the-job training regarding the requirements of road maintenance. Selch continued to receive generally favorable performance reviews as a unit foreman.

Selch was appointed to the position of superintendent of the Greencastle subdistrict of the Crawfordsville district of IDOH in July 1986. Selch was promoted by Jack Isenbarger, who at that time was the head of IDOH. The record does not disclose whether considerations of political affiliation entered into the decision to promote Selch, but there is no genuine dispute that the patronage and party "clearance" methods of filling the employment ranks of IDOH continued through this time period.

As superintendent of the Greencastle subdistrict, Selch was responsible for supervising the maintenance of all interstate highways, state highways, bridges, grass medians, ditches, guard rails, rest stops and other highway facilities, and equipment within the subdistrict. Selch supervised approximately sixty employees, including clerical staff, road crews, mechanics and equipment maintenance personnel. He was responsible for

planning and scheduling the maintenance work to be performed, overseeing the maintenance crews, inspecting the work to ensure compliance with IDOH's standards, compiling data on work completed, communicating with elected officials within the subdistrict, and acting upon complaints from government officials and the general public regarding the condition of highways within the subdistrict. The subdistrict contained approximately 800 miles of state-maintained roadways and included portions of seven counties (including a portion of Marion County--the most densely populated county in Indiana).

Selch's performance appraisal reports between July 1986 and December 1988 indicated that he was performing his job adequately. During this time he never received less than a satisfactory ranking and received several above average rankings.

As the 1988 gubernatorial election approached Selch apparently became apprehensive about retaining his subdistrict superintendent position. In October of 1988 Selch applied to go back to a unit foreman's job, which would have constituted a demotion. At trial the reason he gave for seeking to return to the lower position was that he wanted to ensure that he would maintain a job in the department if "politics changed." Selch did not receive the requested job reduction.

As Selch feared, Evan Bayh was elected governor in the November election. There was testimony that following Governor Bayh's January 1989 inauguration Selch's job performance slipped. Some district level supervisors felt that his morale was lower than before.

Nevertheless, this criticism was never committed to writing in any personnel evaluation form, nor did the criticism prevent Selch from obtaining a merit pay increase in the spring of 1989 based on his 1988 performance. Moreover, the morale of the entire department was negatively impacted *1505 by the change in administrations. Many employees were worried that they might lose their jobs as a result of the change in the party controlling the Governor's office.

During the 1988 gubernatorial campaign, Evan Bayh was critical of IDOH's management practices. Upon assuming office he appointed Christine Letts [FN4] to be Director of IDOH. After reviewing the department, Letts concluded that it needed to be reorganized. One of Letts' first actions was to change the name of the department to the Indiana Department of Transportation (INDOT).

FN4. Letts was chosen from the private sector for leadership of this Department, apparently because of her extensive background and education in business. There is no indication that she was extensively

involved in partisan politics prior to her selection as the head of IDOH.

Also, following soon after his 1988 election, Governor Bayh formed a government operations review committee, composed of a variety of representatives from the private sector. This committee was asked to review all aspects of state government and make recommendations for change. One of the first departments reviewed was the Department of Highways.

One of the review committee's recommendations was the elimination of the general foreman position. The general foreman was a maintenance employee who worked just below the subdistrict superintendent. By shifting the general foreman's responsibilities to the subdistrict superintendent, the committee believed the department would operate more effectively and save the state $1.3 million per year.

Daniel Novreske served as the Deputy Director for Administration of IDOH during the time of Selch's employment, and as such, was familiar with the functions of the subdistrict superintendent. Novreske became Chief Deputy Director for Director Letts after the Bayh administration took over the department, and as early as January 3, 1989 (prior to Bayh's inauguration and during the transition effort), Novreske wrote to a member of Governor-elect Bayh's transition team that "Just as the Director of Highways should be loyal to and share the same philosophy on the operations of state government with the Governor, so too should the Director know that he or she can work with the District Engineers and Superintendents."

In a January 9, 1989, memo from Novreske Letts informed employees of INDOT that she would be "evaluating all district engineer and subdistrict superintendent positions" and would "make a selection from those who are interested and qualified." The memo stated that, "[t]his process will be open to all, both within and outside the Department, and will begin in the very near future. You are welcome to apply for the position." This memo was received by Selch. A brief superintendent job description issued contemporaneously with the memo was not materially different from the old job description under which Selch had been working for nearly two and a half years.

In response to Novreske's memo, Selch submitted his resume and a cover letter dated January 23, 1989. In that letter, Selch expressed his desire to retain or apply for the subdistrict superintendent position which he had held since 1986.

It is interesting to note that Selch listed the Hendricks County Democrat Chairman prominently as his first reference on the resume he

submitted. A week later, Selch followed up his application with a letter to Robert Boxell, Chief of the IDOH Personnel Services Division. [FN5] In his January 30, 1989 letter to Boxell, Selch wrote:

FN5. Testimony regarding the Bayh administration's employment of Boxell for a brief juncture in the critical personnel position in INDOT provided an interesting sidelight into both Indiana political history and the hiring and firing procedures employed by the newly elected Bayh administration. Moreover, this information is relevant to this Court's ultimate finding that the firing of John Selch was politically motivated. Robert Boxell's involvement in the allocation of political lucre has transcended decades of partisan political history in Indiana. In the early 1960's, Boxell became acquainted with a talented young man named Birch Bayh who served in the Indiana Legislature as its Speaker. When Speaker Bayh eventually became United States Senator Bayh, Boxell joined the Senator's staff as a special assistant. After approximately six years in that capacity, Boxell returned to the private sector where he maintained and utilized his political contacts. Senator Bayh's son, Evan, is the "Governor Bayh" referred to throughout this entry. Interestingly, Boxell was selected to be the first personnel director of INDOT not by Commissioner Letts but directly by Governor Bayh's office. Boxell's selection to the INDOT personnel post was made shortly after he met with a key aide of the Governor-elect, William Moreau. Boxell had no significant personnel experience prior to his stint with INDOT. However, because of his decades of experience in the wars of partisan politics in Indiana, if Boxell did not personally know the political affiliation of all of the incumbent subdistrict superintendents and candidates, he knew how to learn that information from others through simple telephone calls. Thus, it was not necessary to require the incumbents or candidates to declare their political affiliation. Plaintiff introduced Boxell's notes which contained "R" and "D" notations next to the names of candidates for subdistrict superintendent positions. After a short stint at INDOT, Boxell was moved to the Indiana Bureau of Motor Vehicles, another state agency that was being restructured pursuant to promises made by candidate Bayh during the 1988 campaign.

***1506** "Further, I would bring to your attention the references I have listed in my resume, for your contact relative to my character and/or performance in areas of specific responsibilities. These references are twofold in purpose, both from a management approach and personnel I was responsible to. Other references pertain to the general public satisfaction in progressive management philosophies in continued highway maintenance

to their needs and satisfaction."

Initially, Selch's resume was the only application received by INDOT for the Greencastle superintendent position. Thereupon Governor Bayh's Executive Assistant, Fred Glass, contacted Greencastle resident Susie Harmless in May 1989. Mrs. Harmless was Vice Chairwoman of the Putnam County Democrat Party and a member of the Judicial Nominating Commission for the State of Indiana. She is also the wife of the Democrat Mayor of Greencastle, Indiana. Mr. Glass testified that the names of three additional applicants for the Greencastle superintendent position were provided by Mrs. Harmless and that these names had been given to her by her husband and by the Chairman of the Putnam County Democrat Party. Other Democrat party officers and local elected officials were contacted as well regarding the Greencastle superintendent position.

One of the names provided by Mrs. Harmless was that of William Sibbitt. Like Mr. Selch in 1984, in May of 1989 Mr. Sibbitt had had no prior highway or road maintenance experience. Mr. Sibbitt, however, was and still is a member of the Democrat Party. Indeed, Sibbitt was informed about the job opening and applied for the position through his Democrat party connections. Mr. Sibbitt was eventually hired to fill the subdistrict superintendent position.

Christine Letts testified that although she received input from Robert Boxell, the Chief of INDOT's Personnel Services Division, her deputy directors and the district managers, she made the ultimate decisions regarding the hiring and firing of subdistrict superintendents. Eventually all 37 subdistrict superintendents who were carry-overs from the previous administration were fired by Letts.

On June 6, 1989, Selch received a letter from Darryl Huyett, the district manager for the Crawfordsville district. The letter advised Selch that he would not be retained as the superintendent at the Greencastle subdistrict and that his employment with INDOT would be terminated effective June 23, 1989.

Selch was offered two lower level positions within INDOT. The first position was as a laborer on a road crew. The second position was the quality inspection job that Selch held when he first joined the department--Highway Engineer Assistant III. Selch refused both offers.

The slight evidence of any on-the-job shortcomings of Selch, the evidence that Mr. Boxell, an individual steeped in the ways of patronage with little or no formal experience in personnel, was the primary individual charged with evaluating the subdistrict superintendents, the documentary evidence reflecting that Boxell focused on political affiliation in evaluating the performance *1507 of subdistrict superintendents, the curious

coincidence that all 37 out of 37 Republican subdistrict superintendents were fired, and the complete lack of relevant job experience possessed by Selch's successor lead this Court to the conclusion that Selch was terminated for partisan political reasons.

During the period of Selch's employment, IDOH (later INDOT) was the largest department within Indiana state government, employing approximately 6,000 workers. This department was responsible for planning, constructing, and maintaining the highway and road system within the State of Indiana. In order to maintain the State's roads, IDOH divided Indiana into six geographical districts, which were further divided into 37 subdistricts. Each subdistrict was run by a superintendent. The entire department was supervised by the central office, which is located in Indianapolis.

Since Selch's firing, the position of subdistrict superintendent has undergone some minor changes. INDOT requested that the Department of Personnel reclassify the superintendent position to a PAT I level position (PAT is an acronym for "professional and technical"), entitled Highway Subdistrict Manager I. In support of its request for reclassification, INDOT included a new organizational chart which showed that the general foreman position had been consolidated into the Highway Subdistrict Manager I position. INDOT also included a new job description for the Highway Subdistrict Manager I position.

The new job description, however, was not materially different from the old job description of the subdistrict superintendent position. A comparison of the different job descriptions submitted at trial and a comparison of Selch's and Sibbitt's testimony regarding their jobs reveals few changes between the old subdistrict superintendent position and the new highway subdistrict manager position.

Perhaps the most significant change between the old subdistrict superintendent position and the new one is that base pay has gone up. As a result of the reclassification, Highway Subdistrict Manager I's [FN6] received a base salary increase (from $22,828 to $25,688), but were no longer eligible for overtime pay.

FN6. For simplicity, the Highway Subdistrict Manager I position will be referred to by its original title--the subdistrict superintendent position--throughout the remainder of this opinion.

Letts also testified that she adopted a "power down" theory of management, in which the objective was for power and authority to be pushed down to the lowest level employee capable of handling the

responsibility. As part of this power down management philosophy, Letts believed that the position of subdistrict superintendent should become a more powerful job within INDOT. Nevertheless, this power down theory of management appears to have had little impact on the job responsibilities of subdistrict superintendents. Subdistrict superintendents already wielded considerable discretion prior to the change in administrations.

During Selch's tenure with the highway department, guidance for the subdistrict superintendent's job was provided by IDOH's Maintenance Management System (MMS). The goal of this system was to promote uniform planning, consistent and effective scheduling, and proper performance of road maintenance throughout the state.

The basic concepts and the specific procedures underlying the MMS were contained within an inch thick manual published by IDOH, entitled "Field Operations Manual." This manual was prepared by IDOH's central office and was heavily relied upon by the subdistrict superintendents, including Selch.

The MMS provided Selch with a detailed computer printout of the "inventory" within his subdistrict for which he was responsible. This printout listed such items as the miles of highway within the subdistrict, the miles of highway lanes, the miles of paint stripe, miles of curb, feet of guardrail, the swath miles of median grass (a swath mile is an area of grass one mile long and the width of the lawn mower), and ***1508** the number of bridges, signs, lights, rest stops, and weigh stations within the subdistrict. In short, the MMS printout listed all the items within the subdistrict that IDOH was responsible for maintaining and was used in conjunction with the field operations manual to plan and schedule all routine maintenance work.

The manual set forth the various work activities that were to be performed by the maintenance crews for each inventory item on the MMS printout. For example, the manual listed a dozen work activities for roadway and shoulder maintenance. Bridge maintenance involved five work activities. Nine work activities were listed under roadside maintenance. The manual also set forward those work activities that could be authorized at the subdistrict level and those that could be authorized only at the district level.

For each work activity, the manual also established performance standards. A typical performance standard set out the approximate number of workers needed to perform the work activity, the type and quantity of materials needed, the equipment needed, a description of the work to be done, an estimate of the average daily production (a measure of the amount of work that the recommended crew size could accomplish within an eight

hour day), and the level of authorization required for the work (subdistrict or district).

IDOH exercised control over maintenance work through the use of computer "crew day" cards. Each card represented one eight hour day of a particular work activity using a standard crew size, equipment and materials. The crew day cards were color-coded to reflect the varying importance of specific work activities. Work crews were not permitted to perform any work unless it had been authorized through the issuance of a crew day card. These cards were prepared by IDOH's central office and sent to the district offices.

The district office retained control over those crew day cards that represented work activities requiring district level approval, the rest of the cards were sent down to the subdistrict superintendents, who retained control over those crew day cards that represented work activities the superintendents could authorize.

Using the inventory lists for each subdistrict, IDOH's central office every year coordinated the preparation of a maintenance work calendar for each subdistrict. For every month of the year, this calendar listed the different number and types of work activities that should be performed within the subdistrict. Crew day cards were printed every year based on the work projected on the maintenance work calendar. For example, if the maintenance work calendar projected that the Greencastle subdistrict would need to commit five crew days to sealing cracks in the month of June, then five crew day cards were printed to authorize this work.

It was the subdistrict superintendent's responsibility to prepare a semi- monthly schedule of work to be performed. To prepare this schedule, the superintendent relied on the maintenance work calendar, on "maintenance needed" reports completed by his subordinates, and on complaints from the public, including complaints coming from public officials such as mayors, county commissioners and state legislators.

The semi-monthly schedule contained a description of work activities to be performed, locations for the work, and an estimate of the number of workers and days required to complete the work activities. A copy of the semi-monthly schedule was forwarded to the district level for review. Based on the semi- monthly schedule, the appropriate crew day cards were distributed to the work crews on a daily basis by the unit foremen.

The subdistrict superintendent had the authority to designate on the card where the crew was to work. For example, if the work activity designated by the crew day card was shallow patching, the superintendent would designate which stretch of road in the district was to be patched that

day. Since the district level managers made only occasional inspections of the roads within the subdistrict, the authority to direct work to certain roads provided the subdistrict superintendent with a great *1509 deal of discretion respecting the maintenance of the highway system within the subdistrict.

Through the issuance of the crew day cards, the work crews knew what work activity to perform, where to do it, how many workers were required, and the materials and equipment needed. At the end of the day a crew would record on the crew day card the amount of work completed, the hours spent, the materials and equipment used, and the employees who performed the work. The card was then returned to a clerk at the subdistrict office. The clerk verified the accuracy and completeness of the cards, and compiled the information contained on them into a report that was forwarded to the district level.

The tools used by the superintendents to monitor the maintenance schedule included monthly maintenance activity summaries (which compared the amount of work completed with the amount of work planned), and field inspections.

The job description under which Selch worked contained a number of references to ministerial functions that related to duties controlled in large part by the MMS program. However, among many other duties, the description required that the subdistrict superintendent:

. . . . . .

--investigates and takes corrective action on complaints and information requests from the general public; --provides personal supervision, personnel, and equipment during emergencies, such as snow and ice removal, detours, accidents, and road repairs, etc.;

. . . . . .

--consults with subordinate personnel providing coordination and direction on the repair and maintenance of state roads and highways;

. . . . . .

The description also identified as an important skill the "ability to effectively communicate with district and subdistrict personnel, contractors, other governmental officials, and the general public." In essence, all of these skills and duties were carried forward into the amended job description devised under the Bayh administration. [FN7]

FN7. The amended job description is largely irrelevant to the issues in this case as it was not developed until some months after Selch was terminated. What is relevant are the functions and responsibilities of and the discretion exercised by the subdistrict superintendents at the time

Selch was terminated.

As Selch viewed his job, he perceived that he was principally responsible for merely a rote application of the work formula and allocation of projects as directed by the MMS. However, a more critical review discloses that the subdistrict superintendent had a broad range of duties that required skills in receiving and acting on public complaints [FN8], judgment in the evaluation and prioritization of maintenance work and the ability to react to different problems arising from weather and road conditions, traffic emergencies and related matters. The extensive breadth of the responsibilities accompanying the subdistrict superintendent position was demonstrated both in the subdistrict superintendents' job description and through the testimony of others who were familiar with the responsibilities of the superintendent, both before and during the Bayh/Letts administration.

FN8. As many as fifteen to twenty telephone calls per day were received by each subdistrict within the state. Many of these calls were complaints lodged by state legislators who lived or worked within the subdistrict or who represented voters who did.

George Schoner, began working as Deputy Commissioner for Operations at INDOT in the Bayh administration in April of 1989, shortly before Selch was terminated. Shortly after his arrival at the department, the INDOT reorganization took place. Authority over the 37 subdistrict superintendents is within Schoner's area of Operations. Schoner viewed the subdistrict superintendents as the front line of the department and he relied upon them to react immediately to any road conditions that might affect travel. He emphasized that subdistrict ***1510** superintendents had to be innovative and flexible in approaching emergency duties and specifically recounted the department's response to a recent tornado.

Schoner also described the superintendent's position as a "customer focus" job and noted that a specific responsibility of the job was to foster "good public relations" in the geographic area of the subdistrict. Schoner discussed the importance of citizen complaints that are routinely received and resolved at the subdistrict level and pointed out that these complaints constantly require the superintendent to make ongoing decisions about road maintenance priorities. Schoner acknowledged that each of the subdistrict superintendents faces different problems because of differences in geography, road surfaces, population base and other factors.

Not surprisingly, the testimony of William Sibbitt, Selch's

successor as subdistrict superintendent, paralleled Schoner's. Sibbitt confirmed that he is in contact virtually daily with members of the public, including mayors, county commissioners and state legislators about conditions of the roadways in his subdistrict. Moreover, in contrast to Selch's testimony, Sibbitt did not feel that his work was limited to simple applications of the MMS. In fact, he indicated that he was only required to refer to the MMS about every three or four months. He described the MMS as nothing more than a general guideline, and indicated that the day-to-day activities of the subdistrict were dictated largely by the emergencies and other situations routinely facing the subdistrict personnel. This Court finds that Sibbitt's explanation of his job functions was more credible than Selch's description.

Darryl Huyett, a degreed civil engineer employed for over 18 years by IDOH, worked as an area engineer during the Selch's tenure with IDOH and continued with the Department in the Bayh/Letts administration. By virtue of his position Huyett was familiar with the duties of the subdistrict superintendents. Huyett confirmed that the superintendents were required to make priorities for road maintenance within the subdistrict and that the superintendent's role in the budget process was substantial because of his familiarity with the conditions, equipment and manpower in the subdistrict. He noted that snow removal alone accounted for approximately one million dollars a year per subdistrict.

When questioned about the budget process, Huyett pointed out that a sterile compilation of historical data was just part of the evaluation process. In his view, the superintendent's particularized input regarding subdistrict needs was essential because historical data does not account for many conditions of which only the superintendent is likely to be aware. As he put it: Yes, but things change. There are storms in between. Some years we have more snow than others. Some years we need to put more pipes in than others because of floods. Maybe ditches fill up, so some years we may have more ditching than others. So yes, we have historical data for a guide, but again we need that input (the superintendent's) for an up-to-date program.

Huyett also corroborated the testimony of Schoner and Sibbitt that the superintendent's job entailed a significant public relations aspect.

Larry Vaughn served as District Maintenance Engineer (formerly titled Assistant District Maintenance Engineer) for the Crawfordsville district, which included the Greencastle subdistrict, during Selch's tenure, and he was retained in that position during the Bayh/Letts administration. He was the direct supervisor for all subdistrict superintendents in the district, including Selch. Vaughn described at length the manner in which

the MMS was and is utilized in the operation of the subdistricts. He also confirmed that the operation of the subdistricts after the Bayh/Letts reorganization is not substantially different than the previous operation.

Vaughn testified that even under the prior administration, Selch was required to make independent decisions, albeit within certain policy guidelines. Vaughn considered *1511 many aspects of the "power down" concept to have already been in place prior to the change in administrations. Vaughn also emphasized the significant public relations aspect of the superintendent's job and that the job involves a great deal more than just a simple application of formulas provided by the MMS. As Vaughn put it: "Obviously someone from the district office can't be there all the time; someone from the central office isn't there all the time, and there's got to be somebody there that can make decisions."

To put it in simple terms, John Selch was the IDOH to the vast majority of the people who lived, worked and passed through the Greencastle subdistrict on state highways and roads. Selch was the point man who handled phone calls and complaints from the public and elected officials.

Moreover, as a subdistrict superintendent Selch possessed substantial discretionary authority. Although the MMS prescribed techniques for performing maintenance functions such as chuckhole patching and snow removal, and classified the roads--with Interstate highways having the highest priority and the least travelled roads having the lowest priority--the subdistrict superintendent alone had (and still has) the final say-so as to which portion of any road is patched or plowed first, and as to when the primary roads are adequately maintained so that the secondary roads can be plowed or patched. The superintendent's response to the public's demand for those services is undoubtedly the single most important factor in determining how INDOT is regarded by the largest part of the populace in each subdistrict. [FN9]

FN9. In contrast to their authority over the timing and location of roadwork, subdistrict superintendents had relatively minor purchasing authority. In order to purchase equipment with a price tag over $1,500, the superintendent was required to submit a written request for the purchase to his district level supervisor. Moreover, superintendents were not permitted to sell equipment. Also, all contracts were negotiated by IDOH's central office.

The subdistrict superintendent's input into the preparation of future budgets was also essential. The superintendent provided information and

analysis to the district level managers who submitted budget estimates to the central office. In doing so, the superintendent relied heavily on historical data regarding the types of work that were required in the previous years, and the hours and equipment required to perform this work. However, the subdistrict superintendent was also required to consider the current conditions of the roadways and equipment in the subdistrict as well as the efficiency and capability of the workers assigned to the subdistrict. By virtue of his responsibilities in the field the subdistrict superintendent acquired information otherwise inaccessible to the district managers. Thus, while final responsibility for preparing future budgets lay with the central office, the subdistrict superintendent's day to day observations within his/her area afforded the subdistrict superintendent the opportunity to channel critical information into the budgetary process.

CONCLUSIONS OF LAW

The parameters that must guide this Court's decision emanate from Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); Branti v. Finkel, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980) and Rutan v. Republican Party of Illinois, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990). [FN10] In Elrod a sharply divided Court held that the First Amendment afforded public employees a right to be free from politically motivated firings. Nevertheless, while Branti and Rutan have given some contour to the right of government employees to be free from politically motivated employment decisions, the proposition that this Court's task has been firmly prescribed is a fiction. The application of the principles discussed in ***1512** the Elrod, Branti, Rutan trilogy to the facts of specific cases has been more art than science. [FN11]

FN10. Page cite numbers are not yet available in the official United States Reports for the Rutan case. Accordingly, citations to Rutan in this entry are to pages in the Supreme Court Reporter.

FN11. The undulations of the case law attest to the fluidity of the standard the district courts have been given to apply. See, e.g., Rutan, 110 S.Ct. at 2756-57 (Scalia, J. dissenting) (collecting contradictory applications of the Elrod-Branti standard); Stott v. Haworth, 916 F.2d 134, 144-45 (4th Cir.1990) (collecting cases from "various jurisdictions" to illustrate the "seemingly inconsistent and unpredictable results" produced by the "application of Elrod- Branti "). Moreover, this Court has previously observed that the Supreme Court's adoption of what is essentially a standardless approach to political firing cases has made the summary judgment process inapplicable in many such cases while at the

same time turning the defense of qualified immunity into a defense of virtual absolute immunity. See Felton v. Bd. of Comm'rs of Greene County, 796 F.Supp. 371, 375-76, 380 (S.D.Ind.1991).

The difficulty in achieving a consistent application of the broad strokes of the Elrod-Branti line of cases is a reflection both of the imprecise language used by the Court and of the myriad different contexts in which the political firing standard has been interposed. [FN12] The makings of this difficulty were apparent from the start [FN13], and, over a decade of jurisprudence later, the proper application of the standard to any new set of facts remains enshrouded in the mists of judicial unpredictability. This fog shows few signs of lifting. [FN14]

FN12. In Meeks v. Grimes, 779 F.2d 417, 419 (7th Cir.1985), the Seventh Circuit observed that, "the problems faced by the courts in applying the formulation have become increasingly intractable. This is the natural product of the fact that, not only do job classifications and personalities vary in each case, but also there are substantial differences between governmental bodies and between individual departments or units within a given governmental body."

FN13. See, e.g., Branti, 445 U.S. at 524, 100 S.Ct. at 1297 (Powell, J., dissenting) ("[t]he standard articulated by the Court is framed in vague and sweeping language certain to create vast uncertainty").

FN14. Based on the decisional record in Elrod, Branti and Rutan there is not a clear majority on the Court in favor of reversing the current tide. However, at least four Justices have expressed a predisposition toward dispensing with the current line of political firing cases, see, Rutan, 110 S.Ct. at 2746, 2749-59 (Scalia, J., dissenting, joined by Rehnquist, C.J., Kennedy, J., O'Connor, J.). Thus, the positions on these issues taken by Justice Souter (replacing Justice Brennan) and by Justice Thomas (replacing Justice Marshall) may be critical to the continued vitality of this area of constitutional adjudication.

Moreover, the Seventh Circuit, no less than any other lower court, has had little luck in shining appreciably more light on the subject. Compare Upton v. Thompson, 930 F.2d 1209, 1215, 1218 (7th Cir.1991) (speculating with little factual analysis that "a Sheriff's core group of advisers will likely include his deputies" and holding (presumably as a matter of law) [FN15] that, "a sheriff may use political considerations

when determining who will serve as deputy sheriff") with Lohorn v. Michal, 913 F.2d 327, 334-35 (7th Cir.1990) (holding that fact that statute described the "Assistant Chief of Police" as a "policymaking" official and fact that statute did not place express limits on "the powers of the office" of the Assistant Chief of Police were insufficient to make the official a policymaker as a matter of law) or compare Matlock v. Barnes, 932 F.2d 658, 664-65 (7th Cir.1991) (jury found that political affiliation was not appropriate criteria for discharge of investigator for city legal department), cert. denied, --- U.S. ----, 112 S.Ct. 304, 116 L.Ed.2d 247 (1991), with Hudson v. Burke, 913 F.2d 427, 434 (7th Cir.1990) (jury found that political affiliation was appropriate criteria for discharge of investigator for city finance committee). Accordingly, this Court approaches the opportunity to apply the Elrod-Branti standards to a new set of facts with all the relish of a sojourner forced down a darkened alley on a moonless night.

FN15. In Thulen v. Bausman, 938 F.2d 84 (7th Cir.1991), cert. denied, --- U.S. ----, 112 S.Ct. 1262, 117 L.Ed.2d 491 (1992), four judges dissented from the court's denial of a petition for rehearing en banc of the Upton decision. Those judges objected that the part of the panel opinion in Upton that reached the question of whether a deputy sheriff is protected by the first amendment's prohibition on political hirings was an ill-advised, "sweeping advisory opinion ... so sweeping, its scope is ... unclear." Thulen, 938 F.2d at 85.

*1513 What is as clear as writing on a wall [FN16] is that once a plaintiff has proved that he was fired, not hired, not promoted, transferred, not recalled or demoted [FN17] and that politics was a motivating factor in the government's adverse employment action "the ultimate inquiry is ... whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." Upton, 930 F.2d at 1214 (quoting Branti, 445 U.S. at 518, 100 S.Ct. at 1295). If such a demonstration cannot be made by the defendant the discharge, demotion or failure to hire violates the First Amendment and damages or an injunction is generally appropriate unless the defendant can show that the plaintiff would have been fired, not hired, or demoted anyway even without the improper motive.

FN16. Of course, while the writing may be clearly visible, it is in the interpretation of the writing that has always laid the rub.

FN17. See Rutan, 110 S.Ct. at 2739 (holding that "the rule of Elrod and Branti extends to promotion, transfer, recall, and hiring decisions based on party affiliation and support"). It takes no stretch of logic to apply Rutan 's extension to demotions as well.

[1] Neither party in this case argued that Mr. Selch was not fired. Indeed, Mr. Huyett, the district manager over Mr. Selch, referred quite unequivocally in his letter to Mr. Selch to "[t]his ... notice of termination of employment with the department." Accordingly, this Court's analysis focuses principally on two questions: (1) whether politics was a motivating factor in the decision to terminate Mr. Selch [FN18] and (2) whether political affiliation was an appropriate requirement for the effective performance of a subdistrict supervisor in the Indiana Department of Highways.

FN18. In this case the defendant's argument that politics was not a motivating factor in Mr. Selch's discharge collapses into its argument that Mr. Selch would have been fired anyway regardless of politics, thus the subject of the neutral reasons given by the defendant for Mr. Selch's termination is not revisited as a separate line of inquiry in this opinion.

1. The evidence is clear that politics was a motivating factor in Mr. Selch's discharge.

This Court concludes that Mr. Selch has proven by a preponderance of the evidence that politics was a substantial motivating factor behind his firing. Mr. Selch has established that he was a member of the Republican party at all relevant times and that those responsible for firing him were aware of his affiliation.

The fact that the Bayh/Letts administration fired all 37 incumbent subdistrict superintendents within a few months after taking office strongly suggests that politics played a substantial role in those termination decisions. After all, even a "political eunuch" [FN19] would know that political purges of this magnitude are difficult to explain away on innocent grounds. Cf. Meeks, 779 F.2d at 418 (newly elected Gary, Indiana city court judge's firing, on the same day judge was sworn into office, of all the court's bailiffs who had worked for the election of the judge's primary opponent led to inference that politics was substantial factor in the decision to fire); Lindahl v. Bartolomei, 618 F.Supp. 981, 987 (N.D.Ind.1985) (Easterbrook, J., sitting by designation) ("a political firing need not be a purge to be unlawful").

FN19. See In the Matter of Mason, 916 F.2d 384, 387 (7th Cir.1990).

In addition, this Court is persuaded by admissions made by representatives of the Bayh Administration. Fred Glass, the Governor's Executive Assistant for Transportation, admitted that politics was one of several factors considered in filling the 37 subdistrict superintendent positions. Glass also revealed that key members of the Democrat party throughout the state were solicited to provide the names and resumes of persons who would be suitable for the superintendent position. Although it is possible that these political sources could have provided INDOT with applicants who had the education and experience needed to qualify for this position, the defendants' claim that they sought out the most qualified applicants rang hollow when Glass revealed in court that he made no effort to ***1514** contact those entities most likely to be in touch with those who were most experienced in the construction industry--construction companies, trade associations, and road contractors. It is common to infer on the basis of an employer's pretextual or suspicious reason for a termination that the employee was terminated for an improper reason. See Graefenhain v. Pabst Brewing Co., 827 F.2d 13, 18 n. 7 (7th Cir.1987) (citation omitted).

Testimony at trial also revealed that Robert Boxell, INDOT's personnel director, maintained a list of applicants for the subdistrict superintendent positions. Boxell had placed the "scarlet letter" "R" next to the names of some of the Republican applicants on this list. Although there was evidence that more than a cursory review of the experience and abilities of the former subdistrict superintendents was made before these thirty seven individuals were fired, a significant emphasis was placed on party affiliation during the review. [FN20] These facts lead this Court to conclude that Selch's status as a Republican was a substantial factor in Letts' decision to fire him.

FN20. For example, Boxell forwarded comments about the incumbent superintendents to Commissioner Letts. Included among these comments were remarks describing some incumbents as "totally political," "very political," "strong politically" and "strong political ties."

[2] Defendants' argument that there was a sufficient independent reason for Mr. Selch's discharge is based entirely on defendants' limited evidence that the plaintiff had morale and performance problems in the first five months of 1989. Although this evidence is relevant on the ultimate

question of the cause of the firing, it does not undermine this Court's conclusion that politics played a significant role in the firing decision. [FN21] Nor does this evidence undercut this Court's conclusion that there was not a sufficient independent justification for Selch's discharge. Defendants' evidence is simply not up to the role defendants would have it play.

FN21. The plaintiff bore the burden of proving only that politics was a substantial factor behind his firing. He did not have to prove it was the only factor. See, e.g., Nekolny v. Painter, 653 F.2d 1164, 1167 (7th Cir.1981), cert. denied 455 U.S. 1021, 102 S.Ct. 1719, 72 L.Ed.2d 139 (1982).

The defendants' evidence that Selch's job performance had slipped came from INDOT employees who were carried over from the preceding Republican administration and from some of the new members of the Bayh/Letts management team. However, on cross examination of these witnesses, plaintiff's counsel brought out the fact that the entire morale of the department was down in the first half of 1989 as a result of widespread apprehension over job security. The entire department, however, was not discharged. The defendants' failed to describe what was unique about Mr. Selch's alleged slip in morale that justified his termination.

Moreover, the verbal assertions that Selch's performance had slipped do not weigh heavily in the balance of this case, especially because the defendants can point to no written evaluation of the plaintiff to substantiate their charge. On the contrary, all of Selch's written evaluations reflect that he was performing his job in an adequate manner. Also, in March of 1989, in the middle of his alleged slump, Selch received a merit increase in salary. Nonetheless, the evidence would support a conclusion that Selch appeared to be more concerned with his own job security than he was in truly furthering the goals of the incoming administration in his subdistrict. His own testimony left this Court with that impression. However, the evidence did not persuade this Court that Selch's day-to-day job performance became deficient. Cf. Sands v. Starke Co. Bd. of Comm'rs, 530 F.Supp. 712, 714 (N.D.Ind.1982) (where defendants' evidence showed numerous specific examples of deficiencies in plaintiff's performance, court concluded that plaintiff would have been fired from her job even if she had not engaged in protected conduct). Accordingly, this Court holds that Selch was fired for a politically motivated reason and now turns to the question of whether politics was an appropriate requirement for the office of highway subdistrict

superintendent.

*1515 2. Political affiliation is an appropriate job qualification for the position of highway subdistrict superintendent.

In Elrod the Supreme Court held for the first time that patronage dismissals were in large part circumscribed by the First Amendment. "The cost of the practice of patronage," said Justice Brennan, "is the restraint it places on freedoms of belief and association." Elrod, 427 U.S. at 355, 96 S.Ct. at 2680-81. "An individual who is a member of the out-party maintains affiliation with his own party at the risk of losing his job." Id. [FN22]

FN22. The concept that patronage in practice actually infringes upon the zone of interest the first amendment was designed to protect has been hotly disputed. See Rutan, 110 S.Ct. at 2746-58 (Scalia, J., dissenting). Of course, that battle is not this court's to join.

Jobs may still be legitimately lost to patronage however. Patronage hiring or firing may be practiced if political affiliation "is an appropriate requirement for the effective performance of the public office involved." Branti, 445 U.S. at 518, 100 S.Ct. at 1295. The theoretical basis for this exception to the rule against patronage is the role that political affiliation and party loyalty are said to play in securing a representative government.

It has also been argued that patronage can play a part in making government more efficient. In Branti Justice Stevens said that, "if an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency." Branti, 445 U.S. at 517, 100 S.Ct. at 1294 (citing Elrod, 427 U.S. at 366, 96 S.Ct. at 2686).

Nevertheless, Justice Brennan's prior plurality opinion in Elrod had, in fact, "rejected ... government effectiveness and efficiency" as a rationale for patronage dismissals. Elrod, 427 U.S. at 366, 96 S.Ct. at 2686. Instead, Justice Brennan found that the only legitimate justification that could save some aspects of patronage from constitutional infirmity was the need for political loyalty of employees, not to the end that effectiveness and efficiency be insured, but to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate. Id. at 367, 96 S.Ct. at 2687 (emphasis added).

[3] In Rutan Justice Brennan was to have the last word. See Rutan, 110 S.Ct. at 2734 ("the government can ensure employee

effectiveness and efficiency through the less drastic means of discharging staff members whose work is inadequate"). So, at least for now, the only constitutionally acceptable basis for patronage is "the end that representative government not be undercut." Elrod, 427 U.S. at 366, 96 S.Ct. at 2686. [FN23] Permissible patronage dismissals typically involve "confidential" and "policy-making" positions [FN24] because "[n]onpolicymaking individuals usually have only limited responsibility and are therefore not in a position to thwart the goals of the in-party." Elrod, 427 U.S. at 367, 96 S.Ct. at 2687. [FN25]

FN23. This Court believes that keeping in mind the role patronage plays in contributing to a representative government can shed some light on whether a given act of patronage passes constitutional muster.

FN24. See Meeks, 779 F.2d at 420 (" '[p]olicymaking' and 'confidential' do accurately describe the vast majority of offices that fall within the realm of legitimate patronage under the Branti formulation").

FN25. "Policymaker" or "confidential" do not describe all the positions in the realm of legitimate patronage. For as the Court has said, "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." Branti, 445 U.S. at 518, 100 S.Ct. at 1295. While this Court has applied the Branti formulation to decide this case, at the same time, this Court finds it helpful to use the term "policymaker" as shorthand to characterize those who may appropriately be discharged for political reasons.

***1516** Defendants contend that they could fire Mr. Selch with impunity because he occupied a policymaking position. In Elrod Justice Brennan articulated several criteria to be considered by courts when drawing the line between policymakers and nonpolicymakers. First, Brennan noted that the line ought to be drawn so that those who are "not in a position to thwart the goals of the in-party" are not penalized for being a member of the out-party. Id. at 367, 96 S.Ct. at 2687.

[4] Second, Brennan emphasized that the responsibility exercised by a public employee was a key factor in determining that employee's status as a policymaker. Brennan noted that employees with only limited responsibility are not typically policymakers. Nevertheless, he noted that even an employee "with a number of responsibilities is [not] necessarily in

a policymaking position." Id. Rather, it is the nature of the responsibilities that is "critical." Id. Responsibilities that are ill-defined or broad in scope are indicative of a policymaking position. Well-defined or limited responsibilities suggest a nonpolicymaking position. Id. at 368, 96 S.Ct. at 2687.

After Branti "confidential" and "policymaking" employees are clearly not the only legitimate targets of patronage dismissals. However, Branti also made clear that there are at least some "policymaking" positions for which "party affiliation is [not] an appropriate requirement." [FN26] Branti, 445 U.S. at 518, 100 S.Ct. at 1295.

FN26. The example given by the Court was a football coach at a state university who, while he may "formulate" policy, falls within the scope of the protection afforded by the First Amendment because "no one could seriously claim that Republicans make better coaches than Democrats." Branti, 445 U.S. at 518, 100 S.Ct. at 1295.

It may also be noted that to the background of criteria, considerations, and suggestions inherited from the Supreme Court the Seventh Circuit has added the gloss that a job that may be filled by patronage where "the position ... authorizes, either directly or indirectly, meaningful input into government decisionmaking on issues where there is room for principled disagreement on goals or their implementation." Nekolny, 653 F.2d at 1170. There are many instances where the Seventh Circuit's reformulation has proven particularly helpful, however, this Court has not found that this is one of those instances.

At least in terms of Mr. Selch's communications with his superiors, it would be a stretch to say that his job entailed "meaningful input into government decisionmaking." Id. Except for the information he supplied in conjunction with the budgeting process, there was little evidence that he was relied upon to provide critical information or other "input" to the hierarchy of the highway department. Moreover, if the term "goals" is broadly construed, there was little room for principled disagreement over Mr. Selch's goals. Broadly put, Mr. Selch's goal was simply to insure that the road construction and maintenance work in his subdistrict was effectively and speedily undertaken. But cf. Tomczak v. City of Chicago, 765 F.2d 633, 641 (7th Cir.1985) (holding that the plaintiff was a policymaker because "[w]hile the ultimate goal of all sides might be the same, there [was] clearly room for principled disagreement in the development and implementation of plans to achieve that goal"), cert. denied, 474 U.S. 946, 106 S.Ct. 313, 88 L.Ed.2d 289 (1985).

Nevertheless, this Court cannot leap to the conclusion that political affiliation was not an appropriate criteria for the effective performance of Mr. Selch's job. As the Seventh Circuit has cautioned: "[a] narrow definition of who is a policymaker necessarily increases the chances of 'undercut [ting] ... the implementation of the policies of the new administration, policies presumably sanctioned by the electorate.' " Nekolny, 653 F.2d at 1169-70 (quoting Elrod, 427 U.S. at 367, 96 S.Ct. at 2687). Moreover, emanating from the indefinite and sometimes conflicting brew of considerations offered by Justice Brennan in the Elrod case, this Court detects two lines of inquiry that are relevant to a consideration of the constitutional propriety of discharging ***1517** Mr. Selch for his politics. [FN27] These lines of inquiry may be formulated as questions:

FN27. This is not to suggest that this Court's opinion, in any way, swims against the tide of Seventh Circuit precedent. Rather, as the following analysis demonstrates, this Court's decision is firmly anchored in the mainstream of Seventh Circuit decisions.

(a) Did Mr. Selch's job require the exercise of a significant level of responsibility?

(b) Did Mr. Selch's job place him in a position in which he could seriously threaten the goals of the in-party?

This Court answers both of the above questions in the affirmative and, accordingly, holds that Mr. Selch could be constitutionally displaced from his job as a subdistrict superintendent in the state highway department merely on the basis of his affiliation with the Republican Party.

a. The position of subdistrict superintendent required the exercise of a significant degree of responsibility.

Even where the exercise of a significant degree of responsibility does not reflect policymaking status, the level of responsibility exercised by an employee can put that employee in a position to strongly impact the success or failure of an administration's programs. That is true because "in implementing [a] basic policy, [an employee] will 'make some decisions that will actually create policy.' " Upton, 930 F.2d at 1215 (citation omitted). Even where an employee's job responsibilities are strictly circumscribed, in today's complex and information-intensive working world it is quite difficult to avoid a situation in which an employee exercises at least some discretion. Of course, the amount of discretion exercised by an employee increases in importance to the employer when the potential impact of that discretion is multiplied by a

significant degree of responsibility also exercised by that employee.

Both the amount of discretion and the level of responsibility exercised by an employee must be considered together to fully understand the sphere of power and authority wielded by that employee. However, while job responsibilities are often listed in a job description, a contract or a statute and are typically commonly understood, discretion is often a subtle and difficult thing to measure.

Nevertheless, the difficulty of quantifying the amount of discretion exercised by an employee should not dissuade a court in a political firing case from attempting to analyze the impact a public employee in a particular position is likely to have on the implementation of an administration's programs and policies. Discretion almost always exists and it can safely be assumed that the more responsibility an employee has the more discretion the employee is likely to have. Moreover, an employee with a position of responsibility can have a significant impact on the implementation of an administration's policies even if that employee's discretionary authority is quite limited. See Nekolny, 653 F.2d at 1170 ("recogniz[ing] that policymaking and policy implementation may occur at many levels, even within a particular office whose sphere of authority is narrowly circumscribed"). Thus, while discretion is surely an important consideration (where it is measurable), the measure of responsibility exercised by an employee, alone, often tells much about the ability of that employee to affect the ultimate implementation of an administration's policies.

This Court concludes that the plaintiff in this case exercised a significant degree of responsibility. The highway department divided the State of Indiana into thirty-seven subdistricts; thus, plaintiff was directly responsible for the day-to-day repair and maintenance of roads within a significant area of the State. [FN28] Moreover, as the Seventh Circuit has recognized, the repair and maintenance of public roads is one of the more visible and important functions of local government. See Hudson, 913 F.2d at 432 ("seemingly inconsequential [local] matters such as potholes and street lights *1518 ... can be important political issues"); but cf. Abraham v. Pekarski, 537 F.Supp. 858, 865 (E.D.Pa.1982), aff'd, 728 F.2d 167 (3rd Cir.1984), cert. denied, 467 U.S. 1242, 104 S.Ct. 3513, 82 L.Ed.2d 822 (1984). Mr. Selch also managed over sixty employees and was responsible for a great deal of very large, very expensive equipment. Cf. Shakman v. Democratic Org. of Cook County, 722 F.2d 1307, 1308 (7th Cir.1983) (policymaker inter alia "supervised 79 employees"), cert. denied, 464 U.S. 916, 104 S.Ct. 279, 78 L.Ed.2d 258 (1983).

FN28. The potential political significance of the Greencastle subdistrict of the Crawfordsville district of INDOT is increased by virtue of the fact that that subdistrict contains a portion of Marion County, the most densely populated county in the State.

In addition, the plaintiff had frequent dealings with the general public and state legislators, as one of his job responsibilities was to handle complaints about the roads in his subdistrict. [FN29] This responsibility made him a representative of the governing administration in a manner different from the typical receptionist. Not only did Mr. Selch handle complaints but he was the official ultimately responsible for fixing the problems identified to him. Thus, his comments and degree of responsiveness were likely to be taken as representative of the entire highway department by those who sought him out.

FN29. In Brown v. Trench, 787 F.2d 167, 170 (3rd Cir.1986), the Third Circuit concluded that a "spokesman" could be discharged based on political affiliation.

Finally, and most importantly in this Court's estimation, Mr. Selch had significant, almost unbridled authority to determine where and when, within his subdistrict, repair work was to be done. It is a fact of life that a state's resources are not limitless; when it comes to highways that means that some potholes will go unfilled so that others can be filled. Thus, an individual who has authority over the ultimate allocation of a significant portion of the state's highway repair activities can have an important and daily impact on the voters who drive within the reach of his authority. While there is no evidence that Mr. Selch ever sought to divert state resources to isolated highways, while neglecting major thoroughfares, or that he scheduled major repair work on an indispensable traffic artery for rush hour, the daily work allocation choices made by Mr. Selch did not have to be that drastic in order to have an impact on the final implementation of the highway department's repair program.

The sheer extent of the many miles of highway the subdistrict supervisor was responsible for meant that it was hard for the district manager to know on any one day where repair work in any single subdistrict was being done. Thus, it was unlikely that there would ever be significant disagreement over what road should be repaired when. However, the fact that disagreement was unlikely made the subdistrict supervisor more a policymaker rather than less one. Perhaps, that is why the Indiana legislature exempted subdistrict superintendents, in addition to

highway district managers, from protection from political firings. See Ind.Code s 8-23-2-3 (Burns Supp.1990). [FN30] The degree of responsibility exercised by Mr. Selch in his position as subdistrict superintendent contributes significantly to this Court's finding that political affiliation was an appropriate criteria for the subdistrict superintendent position. [FN31]

FN30. "[T]he statutory designation of a position as 'policymaking,' ... as the considered description of the state legislature, ... is entitled to great weight." Lohorn, 913 F.2d at 334.

FN31. In this vein this Court has little difficulty concluding that a subdistrict superintendent "run[s] the show at a substantial component of [state] government." Bicanic v. McDermott, 867 F.2d 391, 394 (7th Cir.1989).

b. The subdistrict superintendent occupied a position from which he could

seriously threaten the goals of the in-party.

"Elections often turn on the success or failure of the incumbent to provide ... services." Tomczak, 765 F.2d at 641. Indeed, the work and effectiveness of the state highway department was a major issue in Indiana's last gubernatorial election. Thus, it was important to the incoming Bayh administration to have dependable people in positions that would allow the administration to insure the full and thorough ***1519** implementation of the new party's policies. This was not an issue of importance for the Bayh administration only, however. Under our representative system of government this was also an issue of some importance to the voters who put the new governor in office. See Nekolny, 653 F.2d at 1170 ("[t]hat ability of the government to implement the will of the people is fundamental to our system of representative democracy").

It might have been contended by Mr. Selch that his goal was simply to provide good, effective road maintenance services and that this was a goal shared by both the Bayh administration and that of the outgoing Republican administration. This, however, is "an unduly myopic view of the role of politics in the seemingly apolitical context of [the] universal provision of services." [FN32] Tomczak, 765 F.2d at 641. Not only could significant disputes have potentially arisen over how those services were to be provided, see id., but the opportunity Mr. Selch had in his position to affect and even to "obstruct" the final dispensing of those

services made his job a political one for which party affiliation was a permissible criteria. See Hudson, 913 F.2d at 433 (holding that a position's capacity for "potential obstruction of the duties of [a governmental entity--in that case the finance committee of the Chicago City Council] made political affiliation an appropriate consideration"); Jimenez Fuentes v. Torres Gaztambide, 807 F.2d 236, 246 (1st Cir.1986) (political affiliation could appropriately be considered where "the hostile or foot-dragging actions of any one of the eleven Regional Directors could singlehandedly thwart the Administration's goals in that particular region") (brackets omitted), cert. denied, 481 U.S. 1014, 107 S.Ct. 1888, 95 L.Ed.2d 496 (1987). [FN33]

FN32. It is also apparently not the view of his office that Mr. Selch had when he was hired. This Court has found that Mr. Selch was originally hired because of his political affiliation. Cf. Hudson, 913 F.2d at 432 ("[a]s a starting point in considering whether positions are inherently political, [a] district court [is] entitled to note that [an employee was] hired because of their political affiliation").

FN33. This case has much in common with the Jimenez Fuentes case in which the 1st Circuit held that the position of regional director of the Puerto Rican Urban Renewal and Housing Corporation (CRUV--Corporacion de Renovacion Urbana y Vivienda) was a position for which politics was an appropriate qualification for the job. Each of the eleven regional directors of CRUV was charged not so much with making policy as with implementing it. The court reasoned: In order for the new administration to be given an opportunity to fulfill expectations, it must have available and also appear to have available significant facilitators of policy, people who have the personal and partisan loyalty, initiative, and enthusiasm that can make the difference between the acclaimed success of a government agency or program and its failure or, more typically, its lackluster performance. The presence of such persons advances the goals of representative government; their absence, in Elrod's term, "undercut[s]" such government. Jimenez Fuentes, 807 F.2d at 241.

There can be little doubt that the subdistrict superintendent's ability to decide where and when, within his subdistrict, road work would be done made that position "susceptible to partisan political usage." Hudson, 913 F.2d at 433. Mr. Selch "might have felt compelled to conduct [his office] in a way [he] thought beneficial to [the Republican party] and harmful to [Governor Bayh]." Id. That, of course, is not to say that Mr. Selch would have conducted himself in such a partisan manner, but it is to say

that Mr. Selch does not have a constitutional right to be "in a position to thwart the goals of the in-party." Elrod, 427 U.S. at 367, 96 S.Ct. at 2687. Accordingly, Mr. Selch does not have a valid claim that his constitutional rights were violated by his termination from the position of highway subdistrict superintendent.

Judgment will be ordered against the plaintiff, and Mr. Selch will take nothing by way of his complaint.

ALL OF WHICH IS ORDERED.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOHN W. SELCH,	)	
Plaintiff,	)	
vs.	)	IP 89-778-C
CHRISTINE W. LETTS, in her official capacity as the director of the Indiana Department of Highways; DANIEL A. NOVRESKI, in his official capacity as the chief deputy director of the Indiana Department of Highways; ROBERT D. BOXELL, in his official capacity as the chief of the Personnel Services Division of the Indiana Department of Highways; and FREDERICK GLASS, in his official capacity as the Governor's Executive Assistant for Transportation,	)	
Defendants.	)	

JUDGMENT

For the reasons set forth in a memorandum entry of this same date, after a bench trial this Court has determined that the plaintiff is not entitled to recover by his complaint. Therefore, it is ADJUDGED AND DECREED that judgment now be entered against plaintiff and in favor of the defendants. The plaintiff's cause of action is dismissed with prejudice.

Mr. Selch will take nothing by way of his complaint.

ALL OF WHICH IS ADJUDGED this 3rd day of June 1992.

s/s

John Daniel Tinder, Judge
United States District Court

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No. 93-1036

(3)

In The

Supreme Court of the United States

October Term, 1993

JOHN W. SELCH,

Petitioner,

v.

CHRISTINE W. LETTS, in her official capacity as the Director of the INDIANA DEPARTMENT OF HIGHWAYS; DANIEL A. NOVRESKE, in his official capacity as the Chief Deputy Director of the INDIANA DEPARTMENT OF HIGHWAYS; ROBERT D. BOXELL, in his official capacity as the Chief of the Personnel Services Division of the INDIANA DEPARTMENT OF HIGHWAYS; and FREDERICK GLASS, in his official capacity as the Governor's Executive Assistant for Transportation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the United States Supreme Court should issue a writ of certiorari where:

a. the Seventh Circuit opinion does not directly conflict with the Fourth Circuit Court of Appeals' opinion in *Akers v. Caperton*, 998 F.2d 220 (4th Cir. 1993);

b. the Petition misinterprets the record; and

c. the underlying opinions of the District Court and the Court of Appeals required findings of disputed fact which are not clearly erroneous.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Selch v. Letts*, 5 F.3d 1040 (7th Cir. 1993). The opinion of the District Court is reported as *Selch v. Letts*, 792 F. Supp. 1502 (S.D. Ind. 1992).

STATEMENT OF THE CASE

John W. Selch brought this action against the Defendants pursuant to 42 U.S.C. § 1983, alleging that he was discharged because of his political affiliation in violation of the first and fourteenth amendments to the United States Constitution.

Selch was employed in the position of subdistrict superintendent for the Indiana Department of Highways until his termination on June 23, 1989. The District Court found that Selch's termination was politically motivated but that his position was one for which political affiliation was an appropriate consideration, and the Court of Appeals for the Seventh Circuit agreed.

ARGUMENT

The decision of the Court of Appeals is correct and does not conflict with the opinion of the Fourth Circuit Court of Appeals in *Akers v. Caperton*, 998 F.2d 220 (4th Cir. 1993). Furthermore, the determination made by the District Court and affirmed by the Court of Appeals is highly dependent upon the facts and not susceptible to review on certiorari.

The opinions of the Seventh and Fourth Circuits in *Selch* and *Akers*, respectively, can be reconciled and do not present a conflict. The question whether a position is one for which political affiliation may properly be a criterion is a question of fact. *Nekolny v. Painter*, 653 F.2d 1164, 1170 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982). The courts in *Akers* and *Selch* evaluated different positions and were presented with different facts. Although the two Courts of Appeals reached different conclusions, the opinions are not inconsistent because the facts are distinguishable.

The District Court in *Akers* was confronted with an amendment to a state statute, W. Va. Code § 29-6-4(d), which specified those positions for which political affiliation was an appropriate consideration. 998 F.2d at 222-23. The amendment added county maintenance superintendents to the list of those positions, although the two immediately superior positions were not so included. *Id.* at 225. The District Court noted that the amendatory language in W. Va. Code § 29-6-4(d) was politically timed and inserted by a Senate Committee chaired by Governor Caperton's campaign manager, *id.* at 226 n. 9, and found the statute unconstitutional as applied to the road maintenance position in question. *Id.* at 225. Similar findings were not made in *Selch*.

Furthermore, the District Court in *Akers* found that the county maintenance superintendent " 'receives close day-to-day and technical assistance from the District Maintenance Assistant,' " and that the defendants failed to identify on summary judgment any substantial policy decisions which were within the discretion of the county maintenance superintendent. *Akers v. Caperton*, 797 F.

Supp. 514, 518 (S.D.W. Va. 1992). The position at issue in *Akers*, therefore, is fundamentally different from that held by Selch.

After a full bench trial, the District Court found in *Selch*, and the Seventh Circuit agreed, that "the subdistrict superintendent position involved more than the mundane application of the maintenance guidelines. [Sibbitt] referred to the Operations Manual only once every three or four months. Other testimony indicated that the subdistrict superintendents decided where the road maintenance would be completed within the subdistrict." 5 F.3d at 1046. The District Court concluded that Sibbitt's testimony regarding the responsibilities of the subdistrict superintendent should be credited rather than Selch's, 792 F. Supp. at 1510, and the Court of Appeals properly did not disturb this finding. 5 F.3d at 1046.

The District Court also found, unlike in *Akers*, that the subdistrict superintendents' superiors were rarely present in the subdistricts, and that the subdistrict superintendent was required to make many important decisions, including where and when work was performed within the subdistrict. 792 F. Supp. at 1511. Selch and other subdistrict superintendents made significant contributions to the formulation of subdistrict budgets. 5 F.3d at 1045-46. The subdistrict superintendents also had a significant "potential impact on the actual or perceived implementation of policy" in the exercise of discretion necessary to act on public and governmental complaints and requests. *Id.* at 1047.

The Petitioner's brief misstates the record when it concludes that the District Court and the Court of

Appeals focused "almost exclusively on the fact that Selch was a 'critical and highly visible representative of the state administration . . . ' " (Petition at 5). To the contrary, both the District Court and the Court of Appeals examined both the amount and the nature of the responsibilities inherent in Selch's position, consistent with *Elrod v. Burns*, 427 U.S. 347, 367-68 (1976). The Courts below then went on to determine whether, in the exercise of these responsibilities, a subdistrict superintendent could "threaten the goals of the in-party." 5 F.3d at 1043, 1046-47; 792 F. Supp. at 1517. This analysis is similarly consistent with *Elrod*, 427 U.S. at 367, and *Branti v. Finkel*, 445 U.S. 507, 518 (1980).

Additionally, Selch claims that the "responsibility and discretion inherent in [the subdistrict superintendent] position is closely cabined by the goals, policies, and procedures established by superiors in the bureaucratic hierarchy." (Petition at 3). This position was argued and rejected below at both the District Court and the Court of Appeals based on specific factual findings which required the District Court to weigh the evidence and make assessments of credibility. 5 F.3d at 1045-46.

The Seventh Circuit Court of Appeals concurred in the District Court's factual determinations following a bench trial. The findings below are supported by substantial evidence and should not be disturbed. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *Graver Tank & Mfg. Co. v. Linde Air Prod. Co.*, 336 U.S. 271, 274-75 (1949). This is especially true where, as here, the ultimate question is highly fact-sensitive and the Courts below applied the proper legal standards.

CONCLUSION

The determination made by the District Court and the Court of Appeals is primarily one of fact, and should not be disturbed. Furthermore, the Court of Appeals' opinion below does not conflict with the opinion of the Fourth Circuit in *Akers v. Caperton* because the facts of each case are distinguishable. For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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